No. 22754

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CECIL R. REED,

Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE APPELLEES

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OPINION BELOW

The opinion of the district court (Honorable Bruce R. Thompson) appears at pages 122-126 of the record. Its findings of facts and conclusions of law appear at R. 144-147.

JURISDICTION

Judgment was entered on December 19, 1967 (R. 147). Notice of appeal was filed on February 16, 1968 (R. 148). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

ISSUE PRESENTED

1. Whether there is substantial evidence supporting the decision of the Secretary of the Interior cancelling appellant's homestead entry because it did not meet the cultivation requirements of 43 U.S.C. sec. 164.

STATUTES AND REGULATIONS INVOLVED

The Act of June 6, 1912, 37 Stat. 123, 43 U.S.C. sec. 164, provides in pertinent part:

> No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: * * * Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof, except that in the case of entries under section 218(f) of this title, double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: * * *.

The Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279, provides in pertinent part:

> Any person who has served in the military or naval forces of the United States for a period of at least ninety days at any time on or after September 16, 1940, and prior to the termination of the Korean conflict as determined by Presidential proclamation or concurrent resolution of the Congress, and is honorably discharged from the military or naval forces and who makes homestead entry subsequent to such discharge shall have the period of such service, not exceeding two years, construed to be equivalent to residence and cultivation upon the land for the same length of time. * * * No patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year: Provided, That such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws: * * *.

STATEMENT

This is an appeal from an order of the district court upholding the decision of the Secretary of the Interior cancelling appellant's homestead entry. The relevant facts may be summarized as follows:

On April 15, 1955, Cecil R. Reed filed an application (Nevada 034275) under the homestead laws, to enter a 160-acre tract of public land in Douglas County, Nevada (R. 145). On April 29, 1957, Reed's entry was allowed after the lands had been classified as available for homestead entry under 43 C.F.R. sec. 296.4 (1954 ed.) (R. 145).

On May 11, 1961, Reed filed an application for a patent to the lands included in his entry, stating that he had completed two years of military service, which should be credited to the cultivation time requirements under the Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279. On April 18, 1962, the Department of the Interior, pursuant to the provisions of 43 C.F.R. sec. 1852.2 (formerly 43 C.F.R. sec. 221.67), initiated a contest proceeding, charging that Reed had failed to comply with the cultivation requirements of the homestead laws (R. 145). A hearing was held before a hearing examiner pursuant to the provisions of 43 C.F.R. secs. 1852.1 7(b), 1852.2 2 and 1852.3 (R. 146). The hearing examiner dismissed the contest proceeding (R. 146). The examiner construed the Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279, as authorizing the cultivation of only one-sixteenth of the area entered and ruled that the cultivation of 10 acres in 1959 was sufficient for compliance. The hearing examiner reasoned that (R. 146):

> "* * * since the entryman is entitled to two years of military credit he is only required to cultivate one-sixteenth of the 160 acres for any one of the three years (1958, 1959, 1960) * * *. There is no regulation nor decision of the Department requiring that credit for military service be applied to any particular year during the statutory life of the entry * * *."

The hearing examiner also held that there was no necessity for the entryman (Reed) to show that he had developed a water supply adequate for the 160 acres, stating that cultivation of one-sixteenth of the 160 acres in 1959 met this requirement of the homestead law (R. 146).

The decision of the hearing examiner was appealed to the Director of the Bureau of Land Management who, on July 7, 1964, reversed the decision of the hearing examiner (R. 146-147). The Director held that an entryman was required to cultivate one-eighth of the area of entry as required by 43 U.S.C. sec. 164, as qualified by the Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279, and that the entryman did not cultivate the required amount (R. 147). The area director also held that the entryman failed to establish adequate irrigation facilities in a situation where any attempt to grow crops without the benefit of irrigation was impossible, indicating that the entry was not made or maintained in good faith (R. 147). The decision of the Director was affirmed by the Secretary[1/] on September 29, 1965 (R. 147). The Secretary fully analyzed the evidence before him (Admin. Rec., R. 95-100, 103-107). The Secretary noted that since the only year "in which the entryman purported to cultivate 20 acres was his fourth [April 1960-April 1961], if he did not cultivate 20 acres in that year, his

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1/ We use the term "Secretary" in this brief, although the decision was by a subordinate acting under delegated authority. 24 Fed. Reg. 1348.

final proof must be rejected and his entry cancelled" (Admin. Rec., R. 97). The Secretary then held (Admin. Rec., R. 98):

> The appellant's allegation that he cultivated and planted 20 acres of oats cannot be accepted as substantiated. The land examiner, testifying on behalf of the United States, stated that when he visited the land on January 5, 1962, he found "approximately twenty acres of partially cleared land" (Tr. 29, 38), that all the native vegetation had not been removed, and that "sagebrush was still left standing in the fields, which would interfere with a proper tillage or cultivation of the fields" (Tr. 38). He stated that he saw no evidence of tillage for a crop other than native grasses (Tr. 39), and that no stubble of any oat crop at all was on the land (Tr. 40). If an oat crop had been grown or raised, stubble would have remained (Tr. 40).

The Secretary also noted that for "cultivation to satisfy the requirements of the homestead laws it must be bona fide and not a mere pretense" and that cultivation without artificial irrigation when artificial irrigation is necessary for production of crops "cannot be considered to be bona fide since it cannot be calculated to produce a profitable result" (Admin. Rec., R. 103, 104). In the present case (Admin. Rec. R. 103, 105-106):

> The land examiner for the United States testified that the land involved is "desert in character, lacking nutrients, and requiring water for the growth of crops" (Tr. 31). "The climate is arid in nature" (Tr. 31) and artificial irrigation is indispensable to cultivate the land in the entry and produce a profitable crop (Tr. 32).

* * * * *

> There was no testimony at the hearing that irrigation was not required for the successful raising of a crop in 1961. Appellant admitted that the oats assertedly planted that year did not mature (Tr. 101). Although he stated that the land in his entry did "not necessarily" require the application of water in order to produce a crop, he said it would produce a crop better with the application of water (Tr. 104), that it was possible that the reason he got such an insignificant crop was due to lack of water and that he "would have gotten a beautiful crop" if he had irrigated the 20 acres (Tr. 106). This testimony plainly shows that appellant did not take steps reasonably calculated to produce a successful crop in that he omitted perhaps the most essential step, the application of water. He relied wholly on the natural rainfall (Tr. 106) which is simply not adequate for successful crop production in the area.

The Secretary concluded (Admin. Rec., R. 106):

> Thus, it can be seen that the appellant's purported cultivation here was neither sufficient quantity-wise nor a bona fide effort.

On November 29, 1965, Reed filed a complaint in the United States District Court for the District of Nevada seeking review of the Secretary's decision under the Administrative Procedure Act, 5 U.S.C. sec. 701 and the mandamus statute, 28 U.S.C. sec. 1361. At the trial, after argument by the parties, the case was submitted on the administrative record (R. 122). On July 6, 1967, the court entered an order entitled "Order Granting Summary Judgment" (R. 122), analyzing the Secretary's decision and concluded (R. 126):

> Our review of the entire record and consideration of it as a whole has persuaded us that in this case, the Secretary has shown ample reason to discount the weight of the evidence produced by this plaintiff and has properly held that he has failed to sustain the burden of proof.

On July 17, 1967, Reed moved for a new trial (R. 127). On December 19, 1967, the court denied Reed's motion, noting, how ever, that it had incorrectly entitled its order of July 6, 19 as an "Order Granting Summary Judgment," since no such motion had been made (R. 144), but rather the parties had agreed to submit the case on the administrative record (R. 145). The c corrected its technical error (R. 145) and filed findings of fact and conclusions of law supplementing its previous order (R. 144). The court concluded that the Secretary's decision (R. 147):

> * * * is not arbitrary, is not unreasonable, is supported by the evidence, is in accordance with law, and was rendered without infringement of the requirements of due process of law.

Judgment was entered on December 19, 1967 (R. 147). This app followed (R. 148).

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE SECRETARY'S DECISION CANCELLING REED'S HOMESTEAD ENTRY

A. The only issues on review are whether the Secre decision is based on substantial evidence and his interpretat of statutes administered by him is reasonable. - We note, at

outset, that it is apparent from appellant's briefs, both in this Court and in the court below, that appellant misconstrues the scope of review of administrative decisions under the tests laid down by the courts.[2/] Judicial review of a final administrative decision of the Secretary of the Interior is limited to an examination of the record before the agency. Adams v. United States, 318 F.2d 861, 867 (C.A. 9, 1963); Dredge Corporation v. Penny, 338 F.2d 456, 463 (C.A. 9, 1964). The Secretary of the Interior is charged with administration of statutes relating to the public domain, and his interpretation of statutes and regulations relating to the public domain may not be set aside unless such interpretations are fraudulent or devoid of reason. Udall v. Tallman, 380 U.S. 1, 16-18 (1965). If there is substantial evidence in the record to support the Secretary's

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2/ Since the district court clearly had jurisdiction to review this administrative decision of the Secretary of the Interior under 28 U.S.C. sec. 1361, it is unnecessary to decide whether the court also had jurisdiction under some other statute. The Secretary has taken the position before this Court that the Administrative Procedure Act, 5 U.S.C. sec. 701, is not jurisdictional, and we do not wish to be understood as taking any inconsistent position in this case. However, since our views are fully stated to the Court in United States, et al. v. Walker, No. 22379, and State of Washington v. Udall, No. 22413, now awaiting oral argument, we will not elaborate this issue in this brief. Under any standard of review, the Court will affirm the decision of the Secretary if it is supported by substantial evidence and there is otherwise no error of law. E. J. Palmer, et al. v. The Dredge Corporation, _____F.2d _____(C.A. 9, decided June 26, 1968).

decision on factual matters, whether or not there is substantial evidence to support an opposite view, the Secretary's decision may not be set aside. Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959); E. J. Palmer v. The Dredge Corporation, _____F.2d _____(C.A. 9, decided June 26, 1968); Henrikson v. Udall, 350 F.2d 949, 950 (C.A. 9, 1965); Adams v. v. United States, 318 F.2d 861, 873 (C.A. 9, 1963); Standard Oil Co. of California v. United States, 107 F.2d 402, 414 (C.A. 9, 1940). In many matters before the Secretary, there is an initial decision by a hearing examiner as in the present case. The Secretary will consider the conclusions of the hearing examiner and other subordinate officials, but the ultimate decision is the Secretary's and it is his decision, based upon his review of the record, which is final and appealable. Henrikson v. Udall, 229 F.Supp. 510, 512 (N.D. Cal. 1964), aff'd 350 F.2d 949 (C.A. 9, 1965). See Sisto v. Civil Aeronautics Board, 179 F.2d 47, 51 (C.A. D.C. 1949).

B. There is substantial evidence to support the Secretary's decision. - Turning now to the Secretary's decision in view of the evidence before the Secretary, supra, p. 5 (Admin. Rec., R. 95-100), it is readily apparent that there is substantial evidence to support the decision that Reed had not cultivated 20 acres as required by statute in the fourth crop year. When the testimony of the land examiner is that he found

approximately 20 acres of "partially cleared land" (Tr. 29, 38), that all the native vegetation had not been removed, and that "sagebrush was still left standing in the fields, which would interfere with the proper tillage or cultivation" (Tr. 38), that there was no evidence of tillage for a crop other than native grasses (Tr. 39) and that no stubble of any oat crop at all was on the land (Tr. 40), it is easy to understand why Reed does not argue that there is no substantial evidence to support the Secretary's findings. Nicholas v. Secretary of Department of Interior, 385 F.2d 177 (C.A. 9, 1967). In view of the fact that there is substantial evidence to support the Secretary's decision, it is immaterial that, granting full credibility to the entryman's evidence, there might also be evidence supporting another conclusion. Foster v. Seaton, 271 F.2d 836, 838 (C.A. D.C. 1959).

C. The Secretary's interpretation of 43 U.S.C. sec. 164 as not preventing the institution of a contest proceeding is reasonable. - Reed contends (Br. 12) that the Secretary and the district court did not comply with the standards of proof stated in 43 U.S.C. sec. 164. It is Reed's contention that, since he submitted the testimony of "two disinterested witnesses" and himself when he submitted his final proof, he is entitled to patent under the statute. Reed's argument thus

amounts to a contention that the Secretary must accept, without question, the final proof of an entryman which is credible on its face.[3/] The Secretary obviously interpreted 43 U.S.C. sec. 164 as allowing him to initiate a contest proceeding in which to challenge the veracity of the final proof. This is a reasonable interpretation which, under the authorities cited in Point "A" above, should be affirmed. The authority of the Secretary as guardian of the public interest to see that laws regulating the acquisition of rights in public lands are rightly exercised, has been reiterated many times by the Supreme Court. Best v. Humboldt Mining Co., 371 U.S. 334, 336-338 (1963); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Cameron v. United States, 252 U.S. 450, 459-460 (1920). The Supreme Court has held that, under the pre-emption laws, the Secretary may look into the basis of an entryman's final proof, even after it has been accepted by the local land office and the price of the land paid. Orchard v. Alexander, 157 U.S. 372 (1895). As the district court here pointed out "* * * the Government does not supervise or oversee the activities of the homesteader in proving up his entry" (R. 126). There is no opportunity to investigate the validity of the facts asserted in the final proof until after

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3/ There is nothing in the record to indicate that Reed made this contention either to the district court or in the administrative proceedings. Thus, he is not entitled to raise it for the first time on appeal. United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952).

it has been made. Were the Secretary precluded from having the government officers investigate after filing of the final proof, the public domain would be greatly diminished by all sorts of fraudulent claims. The Secretary's interpretation of 43 U.S.C. sec. 164 as not precluding a contest proceeding is therefore entirely reasonable and should be upheld by this Court. Udall v. Tallman, 380 U.S. 1, 16 (1965).

Reed argues that his attempts at cultivation were made in "good faith" (Br. 8) and, therefore, the Secretary should not have cancelled his entry. The Secretary's opinion on this issue fully disposes of this contention, noting that in view of the arid nature of the land, his failure to attempt any form of artificial irrigation constituted the lack of a "bona fide" effort, required by 43 U.S.C. sec. 164, and that the land examiner's comment about "good faith" (Br. 25) did not refer to the cultivation requirements of 43 U.S.C. sec. 164 (Admin. Rec., R. 103-107).

We are unable to ascertain which of the numerous arguments made in the briefs filed below Reed intends to press on this appeal by his incorporation by reference (Br. 7-8). Therefore, we cannot answer them. Such incorporation by reference does not appear to satisfy the requirements of Rule 28(a)(4), F.R.App.P., that the argument of the appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, * * *."

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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